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12 UNITED STATES DISTRICT COURT

13 DISTRICT OF NEVADA

14 ZANE M. FLOYD,

15 Plaintiff,

16 v.

17 CHARLES DANIELS, Director, Nevada
18 Department of Corrections, et al.,

19 Defendants.

Case No. 3:21-cv-00176-RFB-CLB

**REPLY TO OPPOSITION TO
MOTION FOR STAY OF EXECUTION**

(DEATH PENALTY CASE)

**EXECUTION WARRANT SOUGHT
FOR THE WEEK OF JUNE 7, 2021**

1 **I. INTRODUCTION**

2 On April 21, 2021, Zane Floyd moved this Court to stay the proceedings in
3 state court for seeking a warrant for his execution the week of June 7, 2021. Floyd
4 sought a stay in part because the short time frame between the signing of the
5 warrant and his anticipated execution date meant he would be deprived of a
6 meaningful opportunity to challenge NDOC's novel and experimental execution
7 protocol. This Court acknowledged in its screening order that Floyd stated a viable
8 claim alleging the denial of due process from the lack of notice of NDOC's execution
9 protocol. ECF No. 12 at 7.

10 The State filed an opposition to Floyd's motion on April 30, 2021. The State's
11 principal argument is that this Court cannot enter a stay because no execution
12 warrant has been issued by the state court. ECF No. 25 at 2. The State also
13 continues to seek a tactical advantage from its inexcusable failure to fully inform
14 Floyd and the Court of its intentions regarding the combination of drugs it intends
15 to use in his execution. ECF No. 25 at 4. Floyd addresses the State's failure to make
16 timely disclosures of the information known to NDOC in a reply filed
17 contemporaneously with the instant pleading.

18 Floyd addresses the State's arguments in opposition to his motion to stay his
19 execution below.

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1 **II. ARGUMENT**

2 **A. This Court has the authority to stay or preliminarily enjoin the**
 3 **state court from setting an execution date for Floyd.**

4 Whether this Court phrases an order staying the proceedings in state court
 5 for Floyd's execution as a "stay" or as "preliminary injunctive relief," the Court has
 6 the authority to issue such an order so that Floyd is not executed before he has the
 7 ability to litigate his challenge to NDOC's still unknown execution protocol. Other
 8 federal courts have in fact done so in circumstances analogous to those presented
 9 here.

10 For example, in *In re Ohio Execution Protocol Litigation*, Case No. 2:11-cv-
 11 01016-EAS-MRM, following the Ohio Department of Rehabilitation and Correction's
 12 (ODRC's) review of the January 16, 2014 execution of inmate Dennis McGuire, the
 13 ODRC issued a revised execution protocol which merely increased the dosage of the
 14 two drugs (midazolam and hydromorphone) used under its protocol. Yet, in order to
 15 allow the plaintiffs to litigate a challenge to the new method of execution, the federal
 16 court issued a stay of 90 days to prevent state officials from setting any execution
 17 dates:

18 [I]t is ORDERED, ADJUDGED, and DECREED that the
 19 State of Ohio, and any person acting on its behalf, is hereby
 20 STAYED from implementing an order for the execution of
 21 any Ohio inmate issued by any court in the State of Ohio
 22 until August 15, 2014, or until further Order from this
 23 Court.

20 *In re Ohio Execution Protocol Litigation*, Case No. 2:11-cv-01016-EAS-MRM (S.D.
 21 Ohio (entered May 27, 2014)). Ex. 14. The execution protocol in question was issued
 22
 23

1 on April 28, 2014, only one month before the federal court issued its stay order and
2 before any plaintiffs faced the prospect of an execution date.

3 Here, the time frame is even more compressed while the issues regarding
4 Nevada's protocol are significantly more complex¹ than in the *Ohio Execution*
5 *Protocol* case, and this Court has the same authority to stay/preliminarily enjoin the
6 state proceedings to stop the issuance of an execution warrant. At the present time,
7 Floyd is only approximately five weeks from the week sought by the State for his
8 execution. The Director of NDOC, for some unstated reason, asserts he has not
9 finalized the execution protocol. ECF No. 22-10 at 4. But that is not a reason for
10 NDOC to withhold what it does know regarding the drug or combination of drugs
11 that it intends to use in Floyd's execution. NDOC's use of its own delay for tactical
12 litigation advantages in this case and in the corresponding habeas action is the type
13 of conduct that warrants an equitable remedy from this Court to prevent a situation
14 where NDOC can hinder any scrutiny of its protocol by delaying the release of
15 information regarding the drugs and protocol.

16 Finally, even if NDOC were correct, which it is not, that this Court cannot
17 enter a stay or enjoin the defendants from acting because no execution warrant has
18 been issued by the state court, this Court would still have the authority to defer
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20

21 ¹ NDOC, of course, is not just changing dosage amounts, but is clearly changing
22 lethal injection drugs. Moreover, NDOC is working from a protocol that is novel, was
23 ultimately never used, and was determined to present an unconstitutional risk of
harm by the only court to address the merits of an Eighth Amendment challenge to
its use.

1 consideration of Floyd's stay motion until a warrant is issued and then to stay the
2 execution.

3 **B. A stay of execution is required so that Floyd can meaningfully**
4 **litigate his challenge to NDOC's execution protocol.**

5 This Court must order a stay so Floyd can meaningfully litigate his challenge
6 to NDOC's unknown execution protocol. Under the circumstances here, it is
7 impossible for Floyd to be prepared for a hearing on May 24, 2020, the date this
8 Court tentatively set for the commencement of such hearing. NDOC's pleadings
9 filed on April 23, 2021, make clear that it does not intend to use midazolam in
10 Floyd's execution. That means that the experts Floyd has retained to opine
11 regarding that drug are no longer relevant to testify on that point. Since NDOC still
12 has not disclosed the combination of drugs it intends to use in the execution, Floyd
13 cannot be expected to identify experts who possess specialized knowledge of them.
14 The class, type, and dosage of a drug is information that is of critical importance to
15 an expert. That is why Floyd has proffered a scheduling order to the Court
16 requesting leave to amend his complaint 30 days after NDOC discloses the
17 execution protocol it intends to use. It is not possible to identify, retain, and prepare
18 an expert and advise Floyd regarding the execution protocol versus available
19 alternatives so he can make an informed decision in less time. The State's assertion
20 that this task can be accomplished in 24 to 48 hours is pure fantasy.

21 Similarly, the extensive discovery sought by Floyd will take approximately
22 90 days to conduct. Floyd anticipates requesting approximately 15 to 18 depositions,
23 including depositions of correctional personnel in other states (regarding

1 availability of a possible alternative), Rule 45 subpoenas to other states, site
2 inspections of prison facilities,² requests for production and admission, and
3 interrogatories.

4 A typical discovery period in a 1983 method of execution case lasts an
5 average of 90 days. Floyd has included scheduling orders from the Western District
6 of Oklahoma (discovery cutoff: 90 days), the Middle District of Alabama (discovery
7 cutoff: 90 to 120 days), the Southern District of Ohio (hearing set 8 months from
8 meet and confer), and the Eastern District of Arkansas (discovery cutoff:
9 approximately 9 months) as Exhibits to this pleading. Exs. 15 - 18. If a typical 1983
10 plaintiff receives an average of 90 days in which to conduct discovery of a known
11 protocol, then Floyd should at least receive 90 days to litigate NDOC's still as of yet
12 unknown protocol.

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22 ² The present execution warrant sought by the State seeks Floyd's execution
23 at the Nevada State Prison, which was decommissioned and closed in 2012. ECF No.
11-1 at 11.

1 **III. CONCLUSION**

2 For the foregoing reasons, Floyd requests this Court stay/preliminarily enjoin
3 the State from setting a date for his execution until he has had an opportunity to
4 meaningfully litigate his challenge to NDOC's execution protocol.

5 DATED this 2nd day of May, 2021

6 Respectfully submitted
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CERTIFICATE OF SERVICE

In accordance with LR IC 4-1(c) of the Local Rules of Practice, the undersigned hereby certifies that on this 2nd day of May, 2021 a true and correct copy of the foregoing REPLY TO OPPOSITION TO MOTION FOR STAY OF EXECUTION, was filed electronically with the United States District Court. Electronic service of the foregoing document shall be made in accordance with the master service list as follows:

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